

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE APPLICATION
OF ROPER CONTRUCTION INC.
FOR AN AIR QUALITY PERMIT
NO. 9295, ALTO CONCRETE BATCH PLANT

AQB 21-57(P)

ORDER DENYING MOTION TO DISMISS

THIS MATTER having come before the Hearing Officer on the motion to dismiss Roper Construction Inc.'s ("Roper") permit application and case number AQB 21-57(P), filed by The Ranches of Sonterra Property Owners Association, Don "Donnie" R. Weems and Kathleen Weems ("Movants"), and the Hearing Officer having reviewed the responses filed by Roper and the Air Quality Bureau of the New Mexico Environment Department ("Bureau"), and having heard the arguments of Mr. Hnasko, counsel for the Movants, Mr. Rose, counsel for Roper, and Mr. Vigil, counsel for the Bureau,

FINDS:

1. The leading case on adequacy of notice is *Nesbit v. City of Albuquerque*, 91 N.M. 455, 1977-NMSC-107. The Supreme Court held that the lack of notice rendered subsequent proceedings void. *Id.* at 457. The Court began by noting that

[l]ack of statutory notice is generally held to be a jurisdictional defect which renders the [administrative] action . . . void. However, this rule is tempered somewhat by the fact that New Mexico does not take a strict view regarding compliance with statutory notice requirements. Instead, substantial compliance with the statutory notice provisions would satisfy the purpose of the statute."
Id.

2. The content of the notice was not at issue.

3. The Hearing Officer rejected the arguments advanced in the responses that regulatory notice is somehow less binding a governmental agency than statutory notice, and that the Movants lacked standing.

Notice to Owners of Record

4. 20.2.72.203.B(1) requires the applicant's public notice for a permit shall be "provided by certified mail, to the owners of record, as shown in the most recent property tax schedule, of all properties ... within one-half mile of the property."

5. Movants argues that notice was defective because not everyone within one-half mile of the property received certified mailings.

6. As demonstrated by Roper through evidence in Affidavits and Exhibits, Roper requested a list of all current property tax owners of record from the Lincoln County Assessor and was provided a list of property owners of record and a map showing a one-half mile radius. Notice was sent by certified mail to all property owners on that list, and proof of certified mail was included in Section 9 of the Application.

7. Movants Kathleen and Donnie Weems who reside at 116 Legacy Lane, Alto asserted through an affidavit that they never received notice of the air permit application from Roper.

8. The Weems' parcel was identified by the Assessor as belonging to another individual who did receive the certified mailing as demonstrated by an Exhibit.

9. Movants asserted that the information used by Roper was not current, and that Roper should have verified the Assessors' list by using another method to assure accuracy.

10. Roper asserted that it reasonably relied on the property tax schedule provided by the Lincoln County Assessor, and the Weems' property was not excluded from the notice because the certified mail was sent to the record owner of the parcel.

11. The Hearing Officer ruled that Roper substantially complied with the public notice regulation cited above.

Conspicuous Notice at the Proposed Entrance to the Property

12. 20.2.72.203.B(4)(a) requires a public notice to be posted in "at least four publicly accessible and conspicuous places, including ... at the proposed or existing facility entrance on the property."

13. Movants asserted by affidavit that the notice was posted on a barbed wire fence, about 40 feet from the road on a laminated sign using 10-point font. Therefore, the notice was not “conspicuously” posted at the entrance of the proposed facility.
14. The Bureau asserted that the regulation requires the posting of notice in an accessible and conspicuous *place*, and the barbed wire fence satisfied the rule. Moreover, as the location is currently a vacant lot, there is no “entrance” to post.
15. The Hearing Officer ruled that Roper did substantially comply with the notice requirement in posting the notice where it did.

Administrative Completeness

16. Movant asserted that the Application must be dismissed based on information missing from Section 1-D questions 7 and 11 originally left unanswered.
17. The Bureau attached the revised Application dated August 9, 2021 (three months before Movants filed their motion) which showed the Application was corrected and revised during the Bureau’s review process.
18. The Hearing Officer ruled the omissions identified by Movants were addressed by Roper.

THE HEARING OFFICER concludes that the motion is not well taken and is, therefore,
DENIED.

Gregory
Chakalian

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Gregory Chakalian
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Gregory Chakalian, Hearing Officer

Certificate of Service

I hereby certify that on December 27, 2021, A copy of the Order denying motion to dismiss was sent via electronic mail to the persons listed below. A hard copy will be mailed upon request.

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